STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable Murphy, P.J., and Hoekstra and Markey, J.J.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **Supreme Court No. 125101**

GREGORY M. RICE,
and
JEROME L. KNIGHT **No. 124996**

Defendants-Appellants.

NOTICE OF HEARING
MOTION TO FILE SUPPLEMENTAL BRIEF POST-ARGUMENT*
SUPPLEMENTAL BRIEF

Kym L. Worthy
Prosecuting Attorney
County of Wayne

Timothy A. Baughman
Chief, Research, Training,
and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792

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NOW COME the People of the State of Michigan, by Kym L. Worthy, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief, Research, Training and Appeals, and request this Honorable Court to allow the filing of a very short supplemental brief post-argument, and as reasons state as follows:

1. At oral argument questions were raised regarding the appellate standard of review for credibility determinations by a trial judge on the third Batson prong..

2. Because this question appears not to have been anticipated by either party, the People request permission to make a very brief statement, and certainly have no objection to defendant/appellant being allowed to do the same. The supplemental brief accompanies this motion and would occasion no delay.

RELIEF

WHEREFORE, the People request that the motion to file a short supplemental brief be granted.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

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Argument

I.

In reviewing a legal decision by a trial judge, an appellate court must first determine what it is that the judge has ruled, a decision it makes de novo on the record; the reviewing court then reviews legal conclusions de novo, factual conclusions for clear error, and the application of law to fact for an abuse of discretion.

At oral argument, the question of the appellate standard of review of a trial judge's ruling on a *Batson* challenge was raised by members of the court, particularly with regard to the judge's conclusions on the third-part of the three-part inquiry; that is, assuming a prima facie case has been made out, and the challenged party has provided neutral reasons for the exercise of the challenged peremptory or peremptories to the trial judge, by what standard does an appellate court review a trial judge's determination that the strike was or was not discriminatory? The People believe it fair to say the point was not anticipated by the parties, and wish to add a few observations.

1) Determining what the trial court has ruled

First, as the People sought to make clear at oral argument, before a standard of review can be applied to a judge's decision the appellate court must first determine precisely what it is that the trial judge has ruled. Federal decisions make clear that in assessing the validity of the neutral reasons offered for a challenged strike trial judges should make "explicit factual findings on the record." The trial court should "state whether it finds the proffered reason for a challenged strike to be facially race neutral or inherently discriminatory and why

it chooses to credit or discredit the given explanation...[A trial judge's] clearly articulated findings assist our appellate review of the court's Batson ruling and 'ensure that the trial court has indeed made the crucial credibility determination that is afforded such great respect on appeal."[1] But where a trial judge fails to articulate his or her findings, the appellate court must determine that which the trial judge ruled from the materials at hand—the record, and fair inferences from it, taking all together in context. This is especially important given that trial judges have been known to err in the *Batson* context by requiring more than a neutral reason.

Here, then, as explained at oral argument, the initial comment by the trial judge that she was not "satisfied" with the prosecutor's response, taken in context especially with her remarks that "we are getting very close to a sensitive issue.....I do see that we are getting close, and there are, I don't know two or three minority jurors on this panel. So I think we are getting close to a serious issue here," and that (after saying she was not "satisfied" with the prosecutor's response as to two jurors) "I don't think it is serious enough at this point. *We do have some minorities left on the jury panel* and I'll be watching this closely," is at best ambiguous, and, the People submit, the more ready inference is that the trial judge was concerned with the "numbers" in terms of the racial makeup of the jury, rather than concluding that the prosecutor's reasons were pretextual. But that ambiguity was removed when the trial judge concluded at the end of jury selection that "I don't think either side

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[1] See e.g. *Saiz v Ortiz*, 392 F3d 1166, 1180 (CA 10, 2004); *United States v Castorena-Jaime*, 285 F3d 916, 929 (CA 10, 2002).

ended up selecting this panel *for any reason other* than I think that *these are the ones who will be the fair and impartial persons* to hear and try this case." It must be remembered that the prosecutor raised a "reverse-Batson challenge," on the which the trial judge never ruled, and these concluding remarks by the judge cannot fairly be taken to mean anything other than that the trial judge was rejecting the proposition that *either side* had used race in the selection of the jury (what else could it mean?—and this *specific* finding is itself entitled to deference). Taking the evidentiary record in context, then, given the lack of any specific finding by the trial judge of pretext or racial discrimination on the part of the prosecutor, this court should conclude that the trial judge *did not find a discriminatory exercise of any peremptory challenge* by the prosecutor—as her one *unambiguous* statement says.

2)The determination of neutrality or pretext[2]

A judge's determination of whether a proffered neutral reason is truthful or a pretext to hide discrimination is, like all matters of credibility, given great deference, and reviewed for clear error,[3] for evaluation of the prosecutor's state of mind, or that of defense counsel when defense counsel's strikes are challenged, lies "peculiarly within a trial judge's

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[2] The People believe it goes without saying that the trial judge's statements as to what the law is are reviewed de novo, and that the application of law to facts if reviewed for abuse of discretion.

[3] See e.g. *United States v Uwaezhoke*, 995 F2d 388 , 394 (CA 3, 1993); and see *Batson* itself *Batson v. Kentucky*, 476 U.S. 79, at 98, fn 21, 106 S Ct 1712, 90 L.Ed.2d 69 (1986).

province."[4] As the federal courts put it, "We must accept the factual determination of the district court unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data."[5] Explanations which are "implausible or fantastic" are more likely to be found pretextual, and that finding credited, than reasons that are plausible based on the juror's responses or demeanor.[6] And a rejection by the trial judge of an explanation as not a "good reason" even though not implausible or fantastic may well discredit the trial judge's stated conclusion regarding credibility. For example, juror Johnson here had a close relative who had been convicted of a drug charge, and was, as the prosecutor described her without contradiction, "hesitant" in her answers. Both because of a negative family experience with the criminal justice system, and because the prosecutor believed, given her demeanor, the juror might not "stand up for herself" during deliberations, the prosecutor exercised her challenge. Even had the trial judge found this a pretext and the strike discriminatory—which the People must again point out never occurred—an appellate court might well find this conclusion clear error, unless supported by some evidence, such as the failure to strike other jurors of a different race who also had these characteristics.

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[4] *Hernandez,* 500 U.S. at 365, 111 S.Ct. 1859 (quoting *Wainwright v. Witt,* 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)

[5] See e.g. *United States v. DeJesus* 347 F.3d 500, 507 (CA 3, 2003)

[6] *Purkett v Elem*, 514 US 765, 768, 115 S Ct 1769, 131 L Ed 2d 834 (1995).

Conclusion

This court must determine what the trial court actually held from its review of the record taken in context, and in doing so should find that the trial judge never found that the prosecutor exercised strikes for a racially discriminatory reason, in fact, finding in the end to the contrary. The judge's concern was with keeping an unspecified number of minority jurors on the jury. Where a credibility determination *is* made by the judge, it is reviewed for clear error in the manner above described. And this court should direct judges both to make specific findings on the *Batson* elements, and to be race-neutral themselves (that is, not seek to protect any particular jury racial makeup) in the exercise of their authority.

Relief

Wherefore, the people request that the convictions be affirmed.

Respectfully submitted,

KYM L. WORTHY
Prosecuting attorney

TIMOTHY A. BAUGHMAN
Chief of Research,
Training, and Appeals